IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, *et al.*, Individually and On Behalf Of All Others Similarly Situated,	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-01-3624**
v.	§	**(Consolidated)**
ENRON CORP., *et al.*,	§	
Defendants.	§	

DEFENDANT CINDY K. OLSON'S MOTION TO DISMISS

Plaintiffs have failed to plead a securities fraud action against Cindy K. Olson.[1] The deficiencies in the few allegations against Ms. Olson are obvious under the standards established by this Court and others under Rule 9(b) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act (the "PSLRA").

Introductory Statement

The Complaint does not specifically accuse Ms. Olson of any false statements or any self-dealing of any kind, and it does not implicate her in Enron's financial reporting or accounting. Except for boilerplate (such as listings of defendants), Ms. Olson is mentioned in only six of the Complaint's 1030 paragraphs. Those six references occur in three contexts: (a) Ms. Olson's position at Enron; (b) bonus payments she received; and (c) her sales of Enron stock. The few scattered allegations concerning Ms. Olson do not state a claim for securities fraud against her. Allegations of scienter as to Ms. Olson are altogether lacking. Plaintiffs do not allege (1) what Ms. Olson

[1]Ms. Olson joins in and incorporates by reference the arguments in both the Defendants' Joint Brief Relating to Enron's Disclosures and the Joint Brief of Officer Defendants.

specifically knew at any point in time, (2) what material undisclosed information Ms. Olson may have known, (3) when or how Ms. Olson became aware of any such undisclosed material information, or (4) any facts giving rise to an inference that Ms. Olson acted with the required state of mind. Plaintiffs' allegations of insider trading are also inadequate. Plaintiffs have failed to identify what material inside information Ms. Olson was aware of when she traded or anything suspicious or unusual about her sales of Enron stock. Finally, they have not alleged any particularized facts as to how Ms. Olson participated in any scheme to defraud.

In short, Plaintiffs have not met the particularity requirement, the basis requirement, or the strong inference requirement of pleading an action under the PSLRA or Rule 9(b) as to Ms. Olson.

I. THE APPLICABLE PLEADING REQUIREMENTS

The standards applicable to pleading this securities fraud case against Ms. Olson are set forth in the Joint Brief of Officer Defendants, which is incorporated herein by reference. Among the pertinent requirements, as stated by this Court, is "Plaintiffs must allege what actions each Defendant took in furtherance of the alleged scheme and specifically plead what he learned, when he learned it, and how Plaintiffs know what he learned." *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d 860, 886 (S.D. Tex. 2001). As regards alleged misstatements, Plaintiffs must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Id.* at 865 n.14 (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir.), *cert. denied*, 522 U.S. 966 (1997)). It is therefore necessary to examine the "specific" allegations that have been made against Ms. Olson.

II. THE ALLEGATIONS SPECIFICALLY REFERENCING OLSON DO NOT MEET RULE 9(b) OR PSLRA PLEADING REQUIREMENTS.

"Specific" allegations about Ms. Olson fall into three categories: (a) her position at Enron; (b) bonus payments she received; and (c) her stock sales. None of the allegations against Ms. Olson – either individually or in the aggregate – satisfy pleading requirements under Rule 9(b) and the PSLRA.

A. Position

In paragraph 83(q) Plaintiffs assert that Ms. Olson was "at all relevant times" Executive Vice President, Human Resources, but in paragraph 88 they also include her in a list and identify her as "Senior Vice President, Corporate Affairs and Workforce Diversity, Enron Corp." for the year 1998. (Significantly, those are the only places in the Newby Consolidated Complaint that the departments of Human Resources or Corporate Affairs are even mentioned; in other words; none of the wrongdoing alleged by Plaintiffs is attributed to groups or departments under Ms. Olson.) Plaintiffs also allege that Ms. Olson was on the Management or Executive Committee in 1998 and 1999.[2] Those allegations, however, are insufficient to state a claim against Ms. Olson for securities fraud. *See* Section II.A, Joint Brief of Officer Defendants.

B. Bonuses

Plaintiffs allege that in the years 1997 through 2000 Ms. Olson received bonuses in excess of $1 million "based on Enron's false financial reports and because Enron stock hit certain performance targets." (Complaint ¶ 88(p).) There are no allegations, however, that Ms. Olson had

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[2] Plaintiffs allege that "virtually all of Enron's top insiders have been kicked out of the Company" (Complaint ¶ 4). Perhaps they do not view Ms. Olson to be a "top" insider, but she remains employed by Enron.

anything to do with Enron's financial reports. Moreover, they do not allege any irregularities or improprieties with regard to the financial reporting or accounting of Human Resources and Corporate Affairs, the departments allegedly run by Ms. Olson. The single conclusory allegation concerning Ms. Olson's receipt of bonus payments is insufficient to raise a strong inference of scienter or otherwise state a claim of securities fraud against her. *See* Section II.B, Joint Brief of Officer Defendants.

C. Plaintiffs Do Not Allege Actionable "Insider Trading" by Olson.

In Paragraphs 83(q), 84 and 401, Plaintiffs cite trading history of Ms. Olson showing essentially five stock sales in an effort to assert an insider trading claim against her. As they do with all "Enron Defendants," Plaintiffs attempt to support their "insider trading" claim with the conclusion of their "expert" that it was statistically likely that Ms. Olson's stock trades were made with "the possession and use of material adverse non-public information." (Complaint ¶ 415.) This "expert analysis" is clearly statistically lacking and does not take into account other material information such as portfolio concentration, vesting dates, and other material individualized trading information. The Hakala Declaration should not even be considered by this Court. *See* Joint Brief of Officer Defendants, Section II.C.2. Plaintiffs' effort to allege insider trading against Ms. Olson fails, and the insider trading claims against her should be dismissed.

Plaintiffs have altogether failed to plead anything "unusual" or "suspicious" about Ms. Olson's stock sales, or otherwise meet the requirements of Rule 9(b) and the PSLRA for pleading illegal insider trading, as reviewed in Section II.C.1, Joint Brief of Officer Defendants. None of the insider trading paragraphs identifies any specific material, non-public information known to Ms. Olson when she made the stock sales about which Plaintiffs complain. Plaintiffs only generally

allege that Ms. Olson was in possession of some unspecified "adverse undisclosed information." ¶ 83(q). They do not plead that Ms. Olson was aware of any specific non-disclosure; nor do they allege that Ms. Olson was aware of any public misstatement. It is well settled that simply being a member of management — *i.e.*, in a position to know inside information — does not equate to scienter or knowledge of false statements. *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 412 (5th Cir. 2001) (allegations of motive and opportunity alone are almost always insufficient to establish scienter). This is the kind of generalized, non-specific allegations the PSLRA outlawed. Paragraph 83(q) is further flawed by the absence of any allegation that the undisclosed information (itself unidentified) was material. The Complaint is devoid of (1) any specific allegations concerning nonpublic information (2) of which Ms. Olson was aware or (3) how she knew the undisclosed information was material or nonpublic. *See In re Securities Litigation BMC Software,* 183 F. Supp. 2d at 916.

Plaintiffs also make no specific allegations regarding how Ms. Olson's sales are improper, unusual, or suspicious. The closest Plaintiffs come is to allege that "[t]hese defendants' illegal insider selling escalated massively as Enron's stock moved to more inflated levels during the Class Period and also when internally they knew the scheme was unraveling." This is yet another instance of group pleading, now prohibited by the PSLRA, and is not obviously applicable to Ms. Olson's several sales. Beyond that defect, Plaintiffs' asserted insider trading claim against Ms. Olson fails — and must be dismissed — for the following reasons. First, Plaintiffs do not — and cannot — allege a "pattern" of trading by Ms. Olson. Plaintiffs point to only five sales in the three-year class period by Ms. Olson – thin material from which to weave a pattern. Further, Plaintiffs point to no sales outside the Class Period against which the relevant sales could be measured. *See In re*

Securities Litigation BMC Software, Inc., 183 F. Supp. 2d at 901-02 (citing *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 987 (9th Cir.), *reh'g and reh'g en banc denied*, 195 F.3d 521 (9th Cir. 1999), for proposition that "stock sales cannot be viewed as 'unusual' where defendant 'ha[s] no significant trading history for purposes of comparison.'")

Second, Ms. Olson's insider trades or "pattern" (such as it is) are inconsistent with Plaintiffs' allegations concerning the trading "pattern" of other Defendants who, according to the Complaint, were also "aware" of some undisclosed information. Indeed, according to the Complaint, one or more (but not all) of the Defendants collectively sold in almost every month of the Class Period. Plaintiffs then claim that each Defendant's sales "pattern" – although different from the others – somehow supports the same statistically certain inference. If, however, there truly is a specific "pattern" that demonstrates the use of inside information and other Defendants' sales match or establish that pattern, then Ms. Olson's limited sales cannot possibly match that purported pattern. For example, it is patent nonsense for Plaintiffs to allege that Ms. Olson's five-trade "pattern" matches the "pattern" of Mr. Lay's trades (which number in the hundreds) and that both are recognized patterns of trading on inside information. Any trading "matches" this "pattern." Indeed, according to Plaintiffs, every sale by every insider in the three-year Class Period was suspect. Like all "one size fits all" garments, Plaintiffs' droops here and pinches there.

Third, the timing of Ms. Olson's sales is neither suspicious nor unusual. Her sales of shares, at various dates after the options vested, are exactly the type of activity that one would expect from a rational investor seeking to diversify her portfolio.[3] To establish "suspicious timing," Plaintiffs

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[3]Under Plaintiffs' model, however, an Officer Defendant who sold everything as it vested (a not irrational diversification strategy), or simply sold enough to cover taxes on the exercise of options, would automatically be assumed to have traded on illegal inside information, *even if he had*

must show that Ms. Olson's trades were "at times calculated to maximize personal benefit" to her. *In re Apple Computer Litigation*, 886 F.2d 1109, 1117 (9th Cir.1989). A recognized example would be the sale of a significant percentage of her shares "immediately before a negative earnings announcement." *See, e.g., Wenger v. Lumisys*, 2 F. Supp. 2d 1231, 1251 (N.D. Cal. 1998). Sales made before the market peak, or after its drop, or at other times which do not appear to have maximized seller's proceeds, give rise to no inference of scienter. *See Nathenson,* 267 F.3d at 420-21 (sales made when stock well below "class period high"..."so inauspiciously timed" they "d[id] not meet this test"); *Greebel v. FTP Software*, 194 F.3d 185, 206 (1st Cir. 1999) ('timing does not appear very suspicious" where stock not "sold at the high points of the stock price"). "When insiders miss the boat [by selling when prices are well off the market peak], their sales do not support an inference" of scienter. *Ronconi v. Larkin*, 253 F.3d 423, 435 (9th Cir. 2001). As Plaintiffs' own figures show, Ms. Olson's sales were at prices below the market peak, and on dates both before and after that occurrence.

Fourth, Plaintiffs' charge that Ms. Olson sold 85 percent of her holdings during the three-year Class Period establishes nothing where, as here, she cannot be charged with any alleged misstatements. *See In re Scholastic Corp. Sec. Litig.*, 2000 WL 91939, *13 (S.D.N.Y. Jan. 27, 2000) (stock sales of eighty percent of holdings by executive that did not make any alleged misstatements did not establish scienter); *Head v. NetManage, Inc.*, 1998 WL 917794, *5 (N.D. Cal. Dec. 30, 1998) (executives' sales of 76 percent and 94 percent held "insufficient to create the requisite strong inference of scienter in light of the lack of any specific allegations as to their fraudulent conduct, including the lack of any allegation that they personally made any of the fraudulent statements.")

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had no inside information.

Further, analysis of the alleged percentages of stock sales by Ms. Olson must be placed in the context of the extraordinarily long class period selected by Plaintiffs – 37 months. See Joint Brief of Officer Defendants, Section II.C.1.a. It is obvious that more sales would occur in a three-year class period than in a shorter, more reasonable timeframe. A number of courts have found nothing suspicious or alarming in sales of stock by insiders in percentages that, if adjusted to reflect a three-year "window," would dwarf Ms. Olson's sales. *See, e.g., Silicon Graphics*, 183 F.3d at 985-86, 987 (sales by some individuals ranging up to 75 percent insufficient to infer scienter even in a fifteen week class period); *Ronconi*, 253 F.3d at 435 (sale of 17 percent of holdings in a seven-month period clearly "not suspicious in amount."); *In re Waste Management, Inc. Securities Litigation*, C.A. No. H-99-2183 (S.D. Tex. Aug. 16, 2001) at *16 & *131 (no basis for strong inference of scienter when individuals sold as much as 39.6 percent in a five-month class period).

Finally, an inference of scienter may also be rebutted by facts in the Complaint or in the public record available to Plaintiffs in preparing their pleading, but which they ignore. *See, e.g., Greebel v. FTP Software*, 194 F.3d 185, 206 (1st Cir. 1999) ("closer look provides ready explanations" of trades that "could be suspicious," referring to seller's retirement). Ms. Olson publicly testified before the Senate Governmental Affairs Committee and offered her explanation of her sales activity at Senator Lieberman's request:

> Most of the options that I sold, I sold in 2000 and 2001. I was promoted in 1999 to the Executive Committee of Enron. And in early 2001, Mr. Skillling removed me from the Executive Committee and took away a lot of the human resource functions that I had.
>
> During that same timeframe, my husband and I consulted with a financial advisor. And he told me . . . you are very emotionally attached to your stock. And he said, 'I would highly recommend that you need to diversify.' He had to almost pry it out of my hands.

> And because of the fact that I had been removed from the Executive Committee, Mr. Skilling and I didn't see eye to eye, I was considering leaving the company. And so I was selling my options and they were being put into government bonds by my financial advisor.

(February 5, 2002, Senate Governmental Affairs Committee Hearing, 2001 WL 182109, attached as Ex. 2 to Defendant Cindy K. Olson's Motion to Dismiss in *Tittle v. Enron* filed of even day herewith (p. 3616).)

In sum, Plaintiffs have not pled adequate specific facts to support a claim for insider trading against Ms. Olson.

III. PLAINTIFFS' SECTION 20(a) AND 20A CLAIMS AGAINST MS. OLSON SHOULD BE DISMISSED.

For the reasons set forth in section III of the Joint Brief of Officer Defendants, Plaintiffs have failed to plead an actionable claim against Ms. Olson under either Sections 20(a) or 20A of the Exchange Act.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was forwarded to all counsel listed on the attached Exhibit A Service List by e-mail or facsimile on this 8th day of May, 2002.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs	§	
vs.	§	CIVIL ACTION NO. H-01-3624
	§	(Consolidated)
ENRON CORP., et al.,	§	
Defendants	§	

ORDER

Having considered the motion to dismiss filed by Defendant Cindy K. Olson and all materials filed in support of and in opposition to this motion, and finding that the Complaint fails to state a claim against this Defendant upon which relief can be granted,

It is hereby ORDERED that:

1. Defendant's motion is GRANTED, and

2. The claims against Defendant Cindy K. Olson are DISMISSED with prejudice.

SIGNED this _____ day of _____, 2002.

_____
Melinda Harmon
United States District Judge